No. 17398

In the

United States Court of Appeals

For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a corporation,
Appellant,

vs.

JOYCE A. HARRINGTON,
Appellee.

Brief for Appellant

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This is an appeal from a judgment of the United States District Court for the Northern District of California in favor of the plaintiff and appellee, Joyce A. Harrington. Judgment was entered after a trial before the court. The action is for double indemnity benefits under two policies of insurance issued by appellant, New York Life Insurance Company, to Arnold Harrington, the deceased husband of appellee, as insured. The single indemnity life insurance benefits under the policies were paid without contest, and there is no dispute concerning those benefits. The sole ques-

tion for decision below was whether the death of Arnold Harrington "resulted directly, and independently of all other causes, from accidental bodily injury * * *" within the meaning of the double indemnity provisions of the policies. The evidence is undisputed that Mr. Harrington, an expert with firearms, voluntarily placed a fully loaded Mauser automatic pistol, which he knew to be loaded, to his head and discharged the fatal shot. Appellee contends and the District Court found that the insured relied upon the safety mechanism of the gun and that the discharge of the gun was therefore unintended. Under the rule of the cases, this finding was immaterial. For whatever his hope or expectation, it is apparent that Mr. Harrington voluntarily and needlessly performed an act so dangerous to human life that death followed as a foreseeable consequence. In these circumstances, it is settled that death was not accidental and that appellant was and is entitled to judgment as a matter of law.

JURISDICTION

The Court below had jurisdiction of this action under the provisions of 28 U.S.C., Sections 1332 and 1441(a) (R. 3-4, 5-7).* This Court has jurisdiction of this appeal under the provisions of 28 U.S.C., Section 1291.

STATEMENT OF THE CASE

On February 5, 1960, the date of his death (R. 194), Arnold Harrington, a native of Iowa, was a chief laboratory technician by occupation (R. 72-73) and was thirty-eight years old (R. 194). He had been married to Mrs. Harring-

*The references in this brief to the printed record are thus: (R. 100); the references to the exhibits are thus: (Ex. 6, p. 3). The parties have stipulated and this Court has ordered that the exhibits need not be printed and the Court may consider them in their original form (R. 304).

ton, a Chinese (R. 68), since 1947 (R. 69). The couple met in Shanghai (R. 69) while the insured, a First Class Pharmacist's Mate, was in charge of the naval laboratory in that city at which Mrs. Harrington was employed (R. 68-69). Mr. Harrington had been married once before (R. 68). The prior marriage was a brief one, having been terminated within a period of several months (R. 68).

Shortly after their marriage in 1947, the Harringtons moved to the Bay Area and, except for short intervals, have remained here since then, Mr. Harrington continuing his work as a laboratory technician (R. 69-73). The Harringtons had five children (R. 71), the oldest being Arnold, Jr. who was eleven, and the youngest Kim, who was four (Ex. 3, Appl. No. 26-027-201).

At the time of Mr. Harrington's death, the family was purchasing a home at 617 Spruce Street, South San Francisco (R. 73). The insured's salary at St. Luke's Hospital, where he was employed, was about $1200 per month (R. 74). Though the family had no pressing debts (R. 74), they also had no savings (R. 75). Mrs. Harrington testified that the insured had an ulcer which she said was in a controlled condition (R. 173-74); that he sometimes stuttered when excited (R. 80, 82-83); and that when angry with her, he would "calm himself" by going to the beach alone (R. 87).

The insured had a hobby of collecting guns. At the time of his death he was the owner of five rifles and a number of hand guns (R. 170, 205), including the German Mauser automatic pistol with which he killed himself.* Mr. Harrington could fairly be called an expert in the use of firearms. He was a hunter (R. 170); had been collecting guns for years (R. 170; Ex. 6, pp. 2-3); shot his guns once or twice a week at the firing range at Sharp's Park in the company of his

*The Mauser is in evidence as Exhibit 1 (R. 78).

son, Arnold, Jr. (R. 79, 171; Ex. 6, p. 4); was a member of the South San Francisco Rod and Gun Club and the National Rifle Association (R. 79; Ex. 6, p. 4); shot his guns in competition (Ex. 6, p. 4); and was a very good shot (R. 171; Ex. 6, p. 4). Though the insured had purchased the Mauser only a few weeks before his death (R. 78, 209), he was thoroughly familiar with it, as he was with all of his guns (R. 79, 171, 206, 210).

Mr. Harrington kept his hand guns in a box in the bedroom closet and the ammunition for them at another location (R. 171-72; Ex. 6, p. 3). No one but the insured ever handled the guns in the home (R. 172; Ex. 6, p. 5). With the possible exception of a French gun used for protective purposes (R. 177-78), none of the guns was ever kept in a loaded condition at the home, but all were invariably unloaded when Mr. Harrington and Arnold, Jr. returned home from the firing range (Ex. 6, p. 3). Nevertheless, at the time Mr. Harrington fired the fatal shot, the Mauser was loaded with ten rounds of ammunition (R. 138-39), and the trial court expressly found that Mr. Harrington knew it was loaded when he put it to his head (R. 19).

On the morning of February 5, 1960, the insured was suffering from a slight reaction to a flu shot and consequently stayed home from work (R. 83). During the middle of the morning he drove his wife and a lady friend to Chinatown (R. 83-84). Mrs. Harrington was to call her husband at 3:00 in the afternoon to make arrangements to return home, but she did not do so (R. 84). Instead she went to her friend's house, and there discussed with a theology student the "problem" of her marriage—the fact that though she was a Roman Catholic, she had not been married in her Church and was seeking such a marriage (R. 84). She finally called the insured at 6:00 in the evening, after he and the children

had already eaten (R. 85). When he picked her up Mr. Harrington was "considerably irritable" about her being late (R. 85), and continued to scold her after arriving at the home (R. 85-86). As a "defense" Mrs. Harrington ignored her husband and refused to speak to him (R. 85-86). The quarrel continued (R. 86). After a time the insured left the house, and apparently went alone to the beach as was his custom when angry with Mrs. Harrington (R. 87). Upon his return to the home, something less than an hour later, Mr. Harrington asked his wife "to make up" with him (R. 88), but she refused to do so, and instead continued to refuse to talk to him or even to look at him (R. 88, 176-77, 179). The insured then got up and went to the bedroom to get the Mauser (R. 177). Upon his return to the living room, appellee continued to refuse to speak to him or to look at him (R. 90). The insured then began to make clicking or snapping noises with the Mauser (R. 90) while seated to the left of appellee upon the living room couch (R. 89, 177).* Mrs. Harrington identified these noises as similar to sounds produced at the trial by releasing the hammer of the gun with the safety mechanism set on safe (R. 90).

After a short time the insured got up, moved to a standing position directly in front of appellee and continued to make the snapping noises with the gun (R. 91). Mrs. Harrington looked up, saw the gun in the insured's right hand, and asked him not to make the noises because it made her "nervous" to hear them (R. 91). The insured continued to click the gun (R. 94), and appellee again admonished him (R. 95). Appellee was permitted to testify, over appropri-

*Police diagrams and photographs of the living room and the objects in it were introduced in evidence as Exhibits A1-4 and B1-6 (R. 141, 147, 150). These diagrams and photographs are described and explained in the testimony of Police Officer James F. Swinfard (R. 140-150).

ate objection (R. 92, 95), that Mr. Harrington then said "Don't worry. The safety is on" and "I will prove it to you" (R. 95, 116).

The insured then placed the Mauser to his right temple and discharged it, firing the fatal shot (R. 95, 116). The bullet entered his head at the right temple and emerged slightly behind and above the left ear (R. 139). He fell to the floor, dropping the gun beside him (see Ex. A1), and died later the same evening at St. Luke's Hospital (R. 194). Over appropriate objection, Mrs. Harrington was permitted to testify that after the shot, Mr. Harrington looked at her with "great surprise upon his face, and he threw up his hands as he fell" (R. 118).*

Upon hearing the noise of the shot, the younger children, who had been in bed (R. 86) came into the living room, and Mrs. Harrington gathered them together and sent them all into the bedroom (R. 120-21). She then telephoned the South San Francisco police, who arrived upon the scene in "ten minutes or so" (R. 121). Over appropriate objection (R. 132, 134-37), Officer James F. Swinfard was permitted to testify that in response to his question as to what had happened (R. 131), Mrs. Harrington said "My husband just shot himself, but he didn't mean it" (R. 135).

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*The only other witness to these events was Arnold Harrington, Jr., who was seated facing the living room approximately six to eight feet away from where Mr. Harrington stood (Ex. 6, pp. 9-11; Ex. 1 to the deposition of Mrs. Harrington; Ex. A1). It was stipulated by counsel that in order to avoid the necessity of calling Arnold as a witness at the trial, his deposition (Ex. 6) and his statement to the police (Ex. 4) might be admitted in evidence in lieu of testimony (R. 168-69). Arnold recalled that his parents had had a disagreement (Ex. 6, p. 9); that his father had been standing in front of the coffee table holding the Mauser in his hand (Ex. 6, pp. 11-12); that he did not remember what was said by his parents (Ex. 6, pp. 13-14); that he did not observe his father testing or pointing the gun (Ex. 6, p. 14); that he heard no clicking noises being made by the gun (Ex. 6, p. 14) and that he did not observe the firing of the fatal shot (Ex. 6, p. 14).

When found by the police, the Mauser was lying on the floor near the coffee table (R. 145; Ex. A-1; R. 149; Ex. B-1) and contained nine live rounds of ammunition (R. 151). The expended shell was found on one arm of the couch (R. 146; Ex. A-1). The hammer and safety of the gun were in the "back" position (R. 149; Ex. B-6), which was the full "fire" position of both hammer and safety (R. 235-36).

Three experts testified concerning the condition and manner of operation of the gun: Lester Moore for plaintiff and Robert Chow and Lowell W. Bradford for defendant.* All of the expert witnesses agreed that the gun was in normal operating condition and that it would not fire with the safety set on safe (R. 98, 110, 207, 227-28).

Plaintiff's theory of the case, as evidenced by questions directed to the expert witnesses, was that in manipulating the gun to produce the clicking or snapping sound which Mrs. Harrington heard, the insured inadvertently moved the safety from the safe to the fire position (R. 108-110, 218-19, 246-47) before putting the gun to his head and pulling the trigger (R. 246-47). The snapping sound, according to the evidence, could be produced by releasing the hammer of the gun in any one of three ways: by pulling the trigger with the safety set on safe (R. 101-02); by pushing the safety forward from the fire to the safe position (R. 103) and by "fanning" the hammer with the safety set on safe (R. 103). It was the testimony of the expert witnesses that it would be dangerous and imprudent for a man experienced with guns to tamper with a loaded Mauser in any one of these fashions and then to point the gun to his head. Mr. Chow characterized such conduct as "foolish" and "danger-

*Photographs made by Mr. Bradford of the Mauser in its three normal operating positions are in evidence as Exhibits C1-3, and are identified and explained at R. 230-31.

ous" (R. 222), and Mr. Bradford as "very dangerous and imprudent", whether or not one thought the safety to be on safe (R. 239). The District Court apparently was of the same opinion for it said that the insured's conduct might be characterized as "foolish or dangerous" (R. 20); "dangerous and unnecessary" (R. 28); "foolish, stupid, dangerous, perilous [and] unnecessary" (R. 30-31); and "dangerous, hazardous and negligent" (R. 257).

On February 5, 1960, the date of Mr. Harrington's death, there were in force two policies of insurance (Ex. 3) issued by New York Life to him as the insured. The total face amounts of the policies was $15,000. They provided for the payment of double indemnity benefits under circumstances in which the death of the insured "resulted directly, and independently of all other causes, from accidental bodily injury * * *". The face amounts under both policies were paid without protest (R. 192), and the sole question for decision below was whether the death of the insured was accidental within the meaning of the double indemnity provisions.

After taking the case under submission, and on March 31, 1961, the District Court filed its Memorandum for Judgment to serve as its findings of fact and conclusions of law (R. 15-34).* Judge Carter concluded that the insured's death resulted from accidental bodily injury (R. 31-32); denied defendant's motion to dismiss under Rule 41(b) (R. 33); overruled certain of defendant's objections to and motions to strike evidence upon which ruling had been reserved (R. 33); and awarded judgment to plaintiff (R. 34). The judgment, in the amount of $15,000 with interest, was filed on April 20, 1961 and entered on April 21, 1961 (R. 38-39, 296). On April 28, 1961, appellant filed its notice of appeal (R. 40).

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*The court's memorandum is reported at 193 F. Supp. 675.

SPECIFICATION OF ERRORS

1. The District Court erred in admitting into evidence, over appropriate objection, the testimony of appellee that prior to his injury, Mr. Harrington told her not to worry because the safety of the gun was on safe and that he would "prove" it to her (R. 95, 115-116); and that he tried to show her that the safety was on safe (R. 94). Objection to this evidence was made upon the ground that it constituted inadmissible hearsay testimony (R. 92-93, 115-116). The court reserved its ruling upon this evidence, holding that this and all similar evidence would be received subject to an objection and motion to strike on the grounds stated (R. 92-93, 115-116). The objections were overruled and the motions to strike denied in the court's memorandum (R. 33).

2. The District Court erred in admitting into evidence, over appropriate objection, the testimony of Mrs. Harrington that immediately after his injury, Mr. Harrington allegedly looked at her with "great surprise" upon his face, and threw up his hands as he fell (R. 118). Objection to this evidence was made upon the ground that it constituted hearsay testimony and a conclusion of the witness (R. 116-118). Both objections were overruled (R. 118).

3. The District Court erred in admitting into evidence, over appropriate objection, the testimony of Police Officer James F. Swinfard that some time subsequent to Mr. Harrington's injury, and upon Mr. Swinfard's arrival at the scene, appellee, in response to his question as to what had happened, replied that her husband had shot himself, but that he didn't mean it (R. 131, 135). Objection was made to this evidence upon the ground that it constituted hearsay testimony (R. 132-135) and a motion to strike it was made upon the ground that it represented an opinion and conclu-

sion of the witness (R. 135-137). The court overruled the objection (R. 135-136) and apparently reserved its ruling upon the motion to strike (R. 136-137). The objection was again overruled and the motion to strike was denied by the court in its memorandum (R. 33).

4. The District Court erred in its findings that at the time of his injury the insured thought that the safety lever of the gun was in a safe position and that the gun would not fire in that condition (R. 19); that the fact that the safety lever of the gun was in the fire position at the time of firing was a condition unknown to and unexpected by the insured (R. 19); and that the insured had no intention to take his own life (R. 19). The District Court erred also in its finding and conclusion that the death of Mr. Harrington did not result from suicide (R. 19-20). These findings and this conclusion were based solely upon the foregoing inadmissible evidence and there is therefore no competent evidence in the record to sustain them.

5. The District Court erred in its finding that at the time of his injury, Arnold Harrington thought that the gun with which he fired the fatal shot could be safely pointed at his head (R. 19). There is no evidence whatever in the record, admissible or otherwise, to support this finding and it could only have resulted from pure speculation. Moreover the finding is clearly contrary to the evidence.

6. The District Court erred in its conclusion that the death of Arnold Harrington resulted directly from accidental bodily injury (R. 31-32), and in that connection, in its denial of defendant's motion to dismiss under Rule 41(b). The evidence demonstrates that the death of Arnold Harrington resulted from a needless and voluntary act so dangerous to human life that death followed as a foreseeable consequence. In these circumstances, death was not

accidental and appellant was entitled to judgment as a matter of law.

7. The District Court erred in applying the substantive law relating to the question of accidental death.

SUMMARY OF THE ARGUMENT

1. The findings, the conclusions and the judgment are based upon inadmissible evidence. Over appellant's earnest and repeated objections, the District Court permitted the following evidence to go into the record:

(i) The testimony of appellee that prior to firing the fatal shot, the insured told her not to worry because the safety of the Mauser was set on safe, and that he would "prove" it to her (R. 95, 115-16); and that he tried to show her that the safety was on safe (R. 94);

(ii) The testimony of appellee that immediately after his injury, the insured looked at her with "great surprise" upon his face, and threw up his hands as he fell (R. 118); and

(iii) The testimony of Police Officer James F. Swinfard that more than ten minutes after the shooting, and upon his arrival at the scene, appellee told him that her husband had shot himself, but that he didn't mean it. (R. 131, 135).

All of this evidence was plainly hearsay, and much of it consisted solely of the opinions and conclusions of appellee. Since the District Court relied upon the evidence in deciding the case, its admission was reversible error. Moreover, since without this inadmissible evidence, the inference of suicide would have been inescapable, appellant is entitled to judgment.

2. On the basis of the undisputed evidence, appellant is entitled to judgment as a matter of law. The rule of law established by the cases, including decisions of the Supreme Court of California which are directly controlling, is that when a man voluntarily and needlessly performs an act so dangerous to human life that death follows as a foreseeable consequence, death, when it occurs, is not accidental. The evidence is undisputed that on the evening of February 5, 1960, Arnold Harrington loaded a Mauser automatic pistol with ten rounds of ammunition, and, knowing it to be loaded, placed it to his head and pulled the trigger. In these circumstances, death was not accidental as a matter of law, and appellant was and is entitled to judgment.

3. The District Court erred in applying the substantive law relating to the question of accidental death. In reaching its decision, the District Court failed to follow controlling decisions of the Supreme Court of California relating to the question of accidental death. In addition, the District Court erroneously determined that the hazardousness of the conduct of the insured was to be judged, not by the objective standard of foreseeability, as is the rule of the cases, but by the subjective standard of the state of mind of the insured. Since the District Court applied an erroneous standard of law in reaching its decision, the judgment must be reversed. Moreover, since under either the proper rule of law or the erroneous rule of law applied by the court, the death of the insured could not have been accidental, appellant is entitled to judgment.

ARGUMENT

1. The Findings, the Conclusions and the Judgment Are Based Upon Inadmissible Evidence.

First: It was error to admit into evidence the alleged statement of the insured prior to his injury.

Over appropriate objection by appellant (R. 92-93, 115-16) Mrs. Harrington was permitted to testify that, prior to firing the fatal shot, the insured told her not to worry because the safety of the gun was on safe and that he would "prove" it to her (R. 95, 115-116); and that he tried to show her that the safety was on safe (R. 94). The testimony of appellee concerning the alleged statements of the insured was, of course, plainly hearsay. Since it was necessarily based upon these alleged statements, appellee's testimony that her husband tried to show her that the safety was on safe was also hearsay.

The court's opinion does not disclose the ground upon which this hearsay evidence was admitted (R. 33), but the ground which was urged at the trial was that the evidence was relevant to show the state of mind of the insured and was, therefore, admissible under the state-of-mind exception to the hearsay rule (R. 58-59). It is, of course, true that oral evidence of a state of mind, where relevant, may properly be admitted in some circumstances. Such evidence is admissible however, *only* where there is evidence that the statements made are probably trustworthy and credible and where they were made at a time when there was no motive to deceive. See *People v. Hamilton,* 55 A.C. 887, 900-01, 362 P.2d 473, 481 (1961):

> "From these discussions several general principles have developed. One is that, while declarations directly asserting the existence of a mental condition on the part of the decedent-declarant, and not including a description of the past conduct of a third person that may have caused that mental condition, are and should be admissible, they should be admitted only where there is at least circumstantial evidence that they are probably trustworthy and credible. As was said by this court in *People v. Brust,* 47 Cal. 2d 776, 785, [306 P.2d

> 480], in quoting from *People v. Weatherford,* 27 Cal. 2d 401, 421 [164 P.2d 753], such declarations are 'admissible only if there appears to be a necessity for that type of evidence and a circumstantial probability of its trustworthiness (V Wigmore, p. 202, § 1420) . . . The death of the declarant creates the necessity for resort to hearsay and the declarations, being those of a present existing state of mind, made in a natural manner and not under circumstances of suspicion, carry the probability of trustworthiness. (VI Wigmore, § 1725, p. 80)' (See also McCormick, Evidence (1954), § 268, p. 568). Wigmore also has stated that such declarations are admissible only when they are 'made at a time when there was no motive to deceive.' (6 Wigmore, Evidence, (3d ed. 1940), § 1730, p. 94)."

See also *Milton v. Hudson Sales Corp.,* 152 C.A. 2d 418, 439, 313 P.2d 936, 949 (1957):

> "While declarations of design, intention or purpose, are sometimes admissible as an exception to the hearsay rule, such exception exists only where such declarations possess a high degree of trustworthiness on the issue involved."

These criteria plainly are not satisfied by the alleged statements of the insured. Mr. Harrington was considerably upset at appellee for being late (R. 85-86); his anger had been enhanced by her continued refusal to "make up" with him, or even to speak to or look at him (R. 86, 88, 176-77, 179); and the conclusion is inescapable that at some time during the evening he had loaded the Mauser automatic with ten rounds of ammunition (see *supra* p. 4). There is therefore substantial evidence that the insured was at least contemplating suicide as a relief from his frustrations. Why else would he have loaded the gun? Yet he knew that if it were established that he had taken his own life, no pay-

ment could be made under the double indemnity provisions of his insurance policies. The policies so provide. He also knew that a finding of suicide would be acutely distressing to his wife and children. If suicide was indeed his purpose, the insured had every reason to conceal it and to create an appearance of death by accident. How then can it be said that plaintiff has established that Mr. Harrington's alleged statements were "probably trustworthy and credible" or that they were "made at a time when there was no motive to deceive?"

This evidence was unreliable and its admission was error.

Second: It was error to admit the testimony of appellee concerning the alleged manifestations of the insured after his injury.

Mrs. Harrington was permitted to testify that, immediately after his injury, the insured allegedly looked at her with "great surprise" upon his face and threw up his hands as he fell (R. 118). The difficulty with this evidence is that it was opinion evidence of the purest sort, designed to buttress appellee's testimony concerning insured's alleged statements concerning the condition of the gun. It is settled that opinion evidence is admissible only when the witness has no other way to describe what took place, and when there is some basis in the experience of the witness for arriving at the opinion or conclusion stated. See 32 C.J.S., Evidence, § 444, pp. 72-73; § 455, p. 94. The trial court, aware of this rule, cautioned appellee to describe insured's facial expression rather than to state her conclusion as to his frame of mind (R. 117). But the testimony, as given and received over objection, was not so limited (R. 117-118). It must be clear beyond question that Mrs. Harrington could not possibly have had any basis in experience for characterizing insured's expression as one of surprise. Mr. Har-

rington was in a state of extreme shock. A bullet had just passed through his brain. It was obviously impossible for appellee, as it would have been for any witness, to take into account the shock of the injury and to conclude nevertheless that insured's expression was one of surprise.

Third: It was error for the District Court to admit into evidence the testimony of officer Swinfard concerning the statement made to him by appellee.

Officer Swinfard was permitted to testify that some time subsequent to insured's injury, and upon his arrival at the scene, Mrs. Harrington, in response to a question as to what had happened, replied that her husband had shot himself, but that he didn't mean it (R. 131-135). This evidence was admitted over strenuous objection that it was hearsay testimony (R. 132-135) and that it constituted an opinion and conclusion of the witness (R. 135-37).

The court ruled that the evidence was admissible within the *res gestae* exception to the hearsay rule (R. 132, 135). This ruling was error. The basis for the *res gestae,* or spontaneous declaration, exception to the hearsay rule is the circumstantial guarantee of trustworthiness existing when the declarations are made under the immediate influence of the occurrence to which they relate and before the reflective capacities of the witness have returned. For this reason "the utterance must have been made before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance * * *." *Showalter v. Western Pacific R. R. Co.,* 16 C.2d 460, 468, 106 P.2d 895, 900 (1940). Where there has been sufficient elapsed time to allow the witness to think over the events, and particularly where the declarations made are self-serving, they are not admissible. *People v. Perkins,* 8 C.2d 502, 66 P.2d 631

(1937). The fact that the declarant has in the meantime given attention to other matters, see 32 C.J.S. Evidence, § 419, p. 52, or that the declaration was elicited by a question from another, see *United States v. One 1949 Pontiac Sedan,* 194 F.2d 756 (C.A. 7 1952), *cert. denied,* 343 U.S. 966 (1952), tends to destroy the spontaneous character of the declaration.

Appellee testified that after Mr. Harrington's injury she first gathered the children together, and sent them into the bedroom (R. 120-21), an act which may have required some time and which quite apparently required an exercise of her reflective capacities. She then telephoned the police (R. 120). Mrs. Harrington thought that the police arrived "in ten minutes or so" after her call (R. 121). During this period she obviously had ample time to consider what might be said to the police upon their arrival. Her statement to Officer Swinfard was made in response to his question as to what had happened (R. 131, 135). There is no evidence that appellee was in a state of shock when she made the statement. It was to her interest both as a wife and mother and as a beneficiary under the policies of insurance to avoid an appearance of suicide. In these circumstances, it seems clear, appellee's declaration was not admissible as a part of the *res gestae.*

Moreover, it seems inescapable that the declaration constituted an inadmissible conclusion and opinion of the witness. For what appellee said was this: "My husband just shot himself, but he didn't mean it" (R. 135). This was not a summary statement of fact, based upon Mrs. Harrington's experience, but a speculation by her as to the ultimate issue in this case. Had she attempted to express such an opinion at the trial, the court should have excluded it as a matter of course. The opinion was obviously not rendered

admissible by the fact that it was made by Mrs. Harrington outside of court and while not under oath.

There can be no doubt that the District Court relied heavily upon the foregoing inadmissible evidence in reaching its decision. Thus for example, the alleged statements of Mr. Harrington are directly referred to in the court's memorandum (R. 18, 31) and the objections to them were expressly overruled in that memorandum (R. 33). Moreover, the court's findings can be supported, if at all, only upon the basis of this evidence. The court found:

> "(2) That deceased knew the gun was loaded, but he thought the safety lever was in a safe position and that the gun would not fire in that condition, and, further, that the gun could be pointed at his head safely in that condition;
>
> "(3) That at the time of the firing the safety lever of the gun was in the fire position, but that this condition was unknown to and unexpected by deceased; and
>
> "(4) That the deceased had no intention to take his own life" (R. 19).

Other than the foregoing inadmissible testimony, there is no evidence whatever in the record to support any of these findings.

This means that the judgment must be reversed in any event. It also means that this Court should enter judgment for appellant, for without this inadmissible evidence it is clear that plaintiff could not have prevailed. Plaintiff had the burden of proving accidental death, and, in that connection, of proving that death was not the result of suicide. *Zuckerman v. Underwriters at Lloyd's,* 42 C.2d 460, 267 P.2d 777 (1954). The undisputed facts, the inadmissible evidence aside, are these: that the insured placed a loaded gun, which he knew to be loaded, to his head and pulled the trigger, firing the fatal shot. In these circumstances, the

inference of suicide is inescapable and appellant is therefore entitled to judgment. See *Trivette v. New York Life Insurance Company,* 283 F.2d 441 (C.A. 6, 1960).

2. On the Basis of the Undisputed Evidence Appellant Is Entitled to Judgment as a Matter of Law.

The applicable rule of law is this: when a man voluntarily and needlessly performs an act so dangerous to human life that death follows as a foreseeable consequence, death, when it occurs, is not accidental. These facts are undisputed: on the evening of February 5, 1960, the insured loaded the Mauser automatic with ten rounds of ammunition (see *supra,* p. 4) and, knowing it to be loaded (R. 19), placed it to his temple and discharged the fatal shot (R. 95, 116). In these circumstances, death was not accidental as a matter of law.

It is admitted and beyond dispute that insured voluntarily and intentionally pointed the gun, knowing it was loaded, at his temple and voluntarily and intentionally pulled the trigger. Appellee's position is that in doing this insured mistakenly relied on the safety mechanism to protect him and that somehow he inadvertently moved the safety lever from the safe position to the fire position (R. 108-110, 218-19, 246-47) before putting the gun to his head and pulling the trigger (R. 246-47). Under the rule of the cases the mistaken assumption that the safety would protect him (even if it be assumed from his hearsay statement that insured held such an assumption) could not establish this as accidental bodily injury. On the contrary, to place a loaded gun to one's head and pull the trigger while relying on the safety for protection is hazardous in the extreme; to do so after tampering with the safety is tantamount to suicide. Mr. Harrington's conduct was in no sense accidental and the fatal consequence was not an accident.

The leading California decision is *Postler v. Travelers Ins. Co.,* 173 Cal. 1, 158 Pac. 1022 (1916), *overruled on other grounds in Zuckerman v. Underwriters at Lloyd's,* 42 C.2d 460, 474, 267 P.2d 777, 785 (1954). Postler, the insured, had lost money in a gambling club. He purchased a revolver and returned to the club for the purpose of getting back the money he had lost. He was killed in an exchange of shots after recovering the money by use of the gun. The Supreme Court of California reversed judgment upon a jury verdict for the plaintiff, holding:

> ". . . In order to recover the plaintiff was bound to allege and prove an injury of a kind covered by the contract, i.e., one effected through external, violent, and accidental means. [Citations] The appellant contends, and we think upon good ground, that under any reasonable view of the evidence, the injuries suffered by Postler were not produced by accidental means, but were the natural and probable consequence of his own voluntary acts. In *Western Commercial Travelers' Assn. v. Smith* (85 Fed. 401, 405 [40 L.R.A. 653, 29 C.C.A. 223]), the court said that 'an effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means. It is either the result of actual design, or it falls under the maxim that every man must be held to intend the natural and probable consequence of the means which produced it. . . .' " (173 Cal. at 4, 158 Pac. at 1023-24).

Other California decisions to the same effect are *Price v. Occidental Life Ins. Co.,* 169 Cal. 800, 147 Pac. 1175 (1915) and *Eraldi v. North American Accident Ins. Co.,* 20 F. Supp. 735 (N.D. Cal. 1937). Although these cases involved a different type of risk than that assumed by Mr. Harrington—the risk of death by the hand of another, rather than

by the hand of the insured—they are indistinguishable in principle. In each of them the insured faced a grave risk of death; in each of them he undoubtedly hoped—even expected—to survive; and in each of them, death, when it occurred, was unexpected.

Cases in other jurisdictions directly support the rule of *Postler* and *Price*. In *Allred v. Prudential Ins. Co. of America,* 100 S.E. 2d 226 (N.C. 1957), the insured, a boy of 14, was returning to the country with friends after an evening in town. In order to show the other boys "how brave" he was, Allred lay down in the middle of the highway with his head on the center line. When warned by his friends of an approaching car, Allred did not answer but remained upon the road. The car ran over his body, killing him instantly. The court, in affirming a judgment of involuntary non-suit, held:

> "Applying these principles [the decisions in the *Thompson* and *Baker* cases discussed below] to case in hand, this Court is constrained to hold that the facts and circumstances shown by the undisputed evidence disclose that the death of the insured was 'the natural and probable consequence of an ordinary act in which he voluntarily engaged'." (100 S.E. 2d at 231)

In *Kinavey v. Prudential Ins. Co. of America,* 27 A.2d 286 (Pa. super. 1942) the insured, in a visibly intoxicated condition, was in the company of friends near a bridge spanning a river. Eluding his friends, he climbed over the rail of the bridge and, standing upon a narrow ledge outside the rail, commenced doing various acrobatic stunts. Just before his friends could reach him, Kinavey lost his balance, fell backward into the river and drowned. The court said, in affirming an involuntary non-suit at the close of plaintiff's case:

> "The inference is reasonable that, with the dulling of his normal inhibitions, he, though he realized

> the risk and was warned of it by his friends, voluntarily placed himself in a position of great danger and by his conduct was guilty of such recklessness that falling from the bridge was not only foreseeable by him, but was almost inevitable. We are in agreement with the lower court that death, therefore, did not result from accidental means and that there can be no recovery." (27 A.2d at 287).

In *Ford v. Standard Life Ins. Co.,* 12 CCH Life, Health and Accident Cases 789 (Tenn. App. 1947), the insured was a member of a church which taught that its anointed members could handle poisonous serpents without suffering harm. Believing in the teachings of the church, Ford voluntarily took a rattlesnake into his hands, was bitten, and died within an hour. The court affirmed a directed verdict for the defendant in these words:

> "Was the death of the insured under the facts heretofore shown due to accident?
>
> "We do not have a state of facts where one is bitten by a poisonous snake while walking through the woods or fields. The snake does not suddenly and without warning come on the insured and bite him. The insured of his own free will voluntarily handles the snake without any attempt to protect himself. Certainly this voluntary assumption of this risk is not accidental. It was of his own design. The misconception of the biblical command or language of the Bible will not excuse a person and allow him to profit thereby." (p. 791).

Two cases arose on facts closely comparable to those presented here: *Baker v. National Life & Accident Ins. Co.,* 298 S.W. 2d 715 (Tenn. 1956), and *Thompson v. Prudential Ins. Co. of America,* 66 S.E. 2d 119 (Ga. App. 1951). In *Baker,* the insured had placed a 2″ x 5″ pepper can upon his head and invited a friend to shoot at it. Just as the

friend was squeezing the trigger of the gun, the can started to fall and the insured jerked his head up into the path of the bullet. The court, in affirming an involuntary dismissal of the action, held:

> "From the above stipulation of facts we are of the opinion that the insured should have reasonably foreseen that death, or injury, might result from his own voluntary act.
>
> "* * *
>
> "Death is not caused by accidental means, if it is a natural and foreseeable result of a voluntary, though unusual and unnecessary act or course of conduct of the insured. Target practice with a pistol and with a pepper-can sitting on the head of a human being as the target is neither a usual nor necessary avocation. One who volunteers his head for such an experience must anticipate injury, if he is a normal person." (298 S.W. 2d at 716, 717)

In *Thompson,* the insured had determined by experiment that if one cartridge were placed in a revolver and the cylinder spun, the loaded chamber would "always" come to rest at the bottom and the gun therefore would not fire. Apparently relying upon this mechanical circumstance and assuming that as usual the gun would not fire, Thompson placed a cartridge in one chamber, spun the cylinder, and subsequently placed the gun to his head and pulled the trigger. The gun discharged, killing him. The court affirmed a directed verdict for the defendant, holding:

> "Where one places a loaded pistol to his head and voluntarily pulls the trigger, knowing the gun to be loaded and lethal, nothing more appearing, it is unquestionably no accident that his action results in his injury or death, nor can his death or injury be said to have been effected by accidental means. So too, where one engages in a game of Russian Roulette in

> which all but one of the cartridges are removed from the cylinder of a revolver, the cylinder is spun, the revolver is placed by the participant to his head, and the trigger is voluntarily pulled without ascertaining the position of the cartridge in the chamber in its relation to the firing mechanism, and it occurs that when the trigger is pulled the gun fires and kills or injures the participant, his death or injury is no less intentional than had the gun been fully loaded and his death or injury cannot be said to have been the result of accident or effected by accidental means. In such a case, it will be presumed that the participant intended that he should be killed or injured should fate stop the cartridge in the spinning cylinder in firing position. One engaging in such a bizarre pass-time with a lethal weapon, if he be compos mentis, knows that he is courting death or severe injury, and will be held to have intended such obvious, and well known results if he is killed or injured." (66 S.E. 2d at 123)

These decisions are directly in point. In both of them, and as is contended by appellee here, death was caused by a mistake. Just as Mr. Harrington relied upon the safety of the Mauser, Baker relied upon the marksmanship of his friend and Thompson relied upon the mechanical circumstance of the loaded chamber "always" coming to rest at the bottom of the cylinder. In both of these cases, and because of a circumstance which was actually unexpected, reliance was misplaced. In *Baker* the can unexpectedly fell, and the insured therefore jerked his head into the path of the bullet. In *Thompson* the loaded chamber, for the first time, failed to come to rest at the bottom of the cylinder and the gun unexpectedly discharged. In both *Thompson* and *Baker* death was held not accidental as a matter of law.

The rule of law established by the cases is this—that when a man needlessly and voluntarily performs an act so

dangerous that death follows as a foreseeable consequence, death, when it occurs, is not accidental. Can there be any question that that rule applies here? There is no doubt that Mr. Harrington's conduct was needless. In the words of the District Court, it could be characterized as "foolish" (R. 20) and "unnecessary" (R. 28, 31). Nor is there any question that what he did was voluntary. The District Court found that death was "caused by the voluntary act of the deceased" (R. 19). The extreme danger of Mr. Harrington's conduct would be apparent to anyone. It was apparent to the expert witnesses who termed it "foolish" and "dangerous" (R. 222) and "very dangerous and imprudent" (R. 239) and it was apparent to the District Court which said it might be characterized as "foolish or dangerous" (R. 20) "dangerous and unnecessary" (R. 28) and "foolish, stupid, dangerous, perilous [and] unnecessary * * *" (R. 30-31).*

Did death follow as a foreseeable consequence of the act? Obviously, it did. In the words of the District Court "he [Mr. Harrington] either knew or should have known that he was doing a dangerous thing". (R. 281) The law is clear. Under the rule of the cases, death was not accidental and appellant was and is entitled to judgment.

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*See also the statements made by the District Court during argument: "Now, I would go further. That it was caused by a dangerous, hazardous, negligent act on the part of the deceased by pointing the gun at his head when it was loaded and he knew it was loaded * * *"

"* * *

"So, you come to the question: is the performance of a dangerous, hazardous, negligent act which does produce death one that would either make it accidental or non-accidental". (R. 256-57)

3. The District Court Erred in Applying the Substantive Law Relating to the Question of Accidental Death.

The District Court correctly held that since California law governs this action, it was the duty of the court to apply that law as expounded by the Supreme Court of this State (R. 21). The court apparently concluded, however, that no decisions of the California Supreme Court were controlling (R. 22).* This was error, for the decisions of the Supreme Court of California in the *Postler* and *Price* cases clearly established the rule of law which must govern here. It is true that the facts in *Postler* and *Price* were not identical to the facts of the present case, but the legal principles involved were identical, and the rule of law established by those cases cannot be ignored. See *United States Fidelity & Guaranty Co. v. Anderson Const. Co.,* 260 F.2d 172 (C.A. 9 1958); *Benz v. Compania Naviera Hidalgo, S.A.,* 233 F.2d 62 (C.A. 9 1956), *aff'd,* 353 U.S. 138 (1957). In the *Baker* and *Thompson* cases that same rule was applied to factual situations comparable to those presented here, and resulted in judgments for the defendants as a matter of law. If the same facts were presented to the California courts, there is no reason whatever to suppose that they would not follow those decisions.

The District Court apparently concluded that the authority of *Postler* and *Price* had been weakened by more recent decisions of the California District Courts of Appeal in *Losleben v. California State Life Ins. Co.,* 133 Cal. App. 550, 24 P.2d 825 (1933), *Rooney v. Mutual Benefit Health and Accident Ass'n,* 74 C.A. 2d 885, 170 P.2d 72 (1946)

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*The court said in its memorandum: "Careful research by counsel and by the Court fails to disclose any California case which closely resembles this case on its facts and it would be difficult to say with certainty what the California courts would hold under these circumstances." (R. 22)

and *Cox v. Prudential Ins. Co.,* 172 C.A. 2d 629, 343 P.2d 99 (1959). (R. 28-30). We find nothing in those cases which questions or criticizes the rule of law established in *Postler* and *Price.* On the contrary, those decisions are either clearly distinguishable or, to the extent that they are relevant at all, they endorse the rule of *Postler* and *Price.* We discuss and distinguish them herewith.

Losleben v. California State Life Ins. Co., 133 Cal. App. 550, 24 P.2d 825 (1933) held that injuries received by a workman who jumped down from a three foot bench in the course of his duties were caused by accidental means. There was no voluntary exposure to extreme danger as in *Postler* and *Price,* and there was therefore no need even to consider the effect of those decisions, much less to question their authority.

Rooney v. Mutual Benefit Health and Accident Ass'n., 74 C.A. 2d 885, 170 P.2d 72 (1946) holds only that injuries sustained by the insured upon being knocked to the street in a fist fight resulted through accidental means. The basis for the decision in *Rooney* was that it could not be said as a matter of law that the insured should have foreseen that by entering into the fight he might bring about his death. The principle of law applied was therefore the same as that announced in *Postler* and *Price.* The distinction between the slight risk involved in engaging in a fist fight as in *Rooney* and the mortal hazard involved in entering into a gun fight as in *Postler* and *Price,* or in pointing a loaded gun at one's head as in the present case, needs no elaboration.

In *Cox v. Prudential Ins. Co.,* 172 C.A. 2d 629, 636, 343 P.2d 99, 103 (1959), the insured had jumped out of a moving vehicle, but had fallen to the road uninjured. In an effort to escape from the peril of oncoming traffic, Cox rolled to

the right, and was run over by a truck. The court held that death resulted through accidental means since "it cannot be said as a matter of law that Cox knew or reasonably could have anticipated that in going to his right he would be run over by the truck." Again the rule of law applied was the same as that in *Postler* and *Price,* the difference being that Cox, in attempting to escape from a position of peril, might not reasonably have foreseen the increased danger he was creating, while in *Postler* and *Price,* as in the present case, the danger was obvious. None of these cases, either expressly or by indirection, questions the rule of *Postler* and *Price.*

The memorandum of the District Court strongly suggests that in determining the question of the hazardousness of Mr. Harrington's conduct, the court applied not the objective standard of foreseeability to the reasonable man, as is established by the cases, but the subjective standard of the state of mind of the insured. This conclusion follows from the court's definition of an accident for the purposes of this case, as "a casualty—something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person insured * * *" (R. 24-25). It follows also from the fact that the court found it necessary to find that the insured thought that the loaded gun could be pointed safely at his head (R. 19), a finding which would have been immaterial if an objective standard had been applied.

The rule of law applied by the District Court was erroneous, for it is settled that where, as here, the insured voluntarily and needlessly places himself in extreme danger, the apprehension of that danger is to be determined by the objective standard of reasonable foreseeability. See the following California decisions where that rule was stated and applied:

Postler v. Travelers Ins. Co., 173 Cal. 1, 5, 158 Pac. 1022, 1024 (1916), *overruled on other grounds in Zuckerman v. Underwriters at Lloyd's*, 42 C.2d 460, 474, 267 P.2d 777, 785 (1954),

(whether the death of the insured "was the natural and probable consequence of his own voluntary acts");

Eraldi v. North American Accident Ins. Co. 20 F. Supp. 735, 738 (N.D. Cal. 1937),

(whether the insured "either foresaw or should have foreseen that death or injury might result");

Rooney v. Mutual Benefit Health and Accident Ass'n., 74 C.A. 2d 885, 890, 170 P.2d 72, 75 (1946),

(whether "in utilizing the means to which he resorted the insured knew or should have known that he would probably sustain the injury which resulted as a consequence thereof");

Cox v. Prudential Ins. Co., 172 C.A. 2d 629, 636, 343 P.2d 99, 103 (1959),

(whether the insured "knew or reasonably could have anticipated" the injury which resulted).

Since it appears that the District Court failed to apply the proper rule of law, the judgment must be reversed. See *Lindbar, Inc. v. St. Louis Fuel & Supply Co.,* 276 F.2d 882 (C.A. 6 1960); *Bogue Electric Mfg. Co. v. Coconut Grove Bank,* 269 F.2d 1 (C.A. 5 1959). Since the death of the insured was clearly foreseeable, judgment should also be entered for appellant under the rule of law established by the cases.

Moreover, even under the subjective test erroneously applied by the court, it seems plain that death was not acci-

dental. The finding of the court that the insured thought that the loaded gun could be safely pointed at his head cannot be sustained, for there is no basis whatever for it in the evidence. On Mrs. Harrington's own testimony (R. 95, 116) the insured wanted to "prove" to her that the safety was on safe and so (notwithstanding her expressed apprehension about his "snapping" the gun mechanism), he intentionally pointed the gun at his head and pulled the trigger. Under these circumstances he wilfully, needlessly and recklessly took the risk that the safety would not work or had become dislodged. He took this chance and lost. To conclude as the District Court did that the insured anticipated no danger was speculation of the purest sort and, as such, was error. See *In re Leichter,* 197 F.2d 955 (C.A. 3 1952). It is clear beyond question that Mr. Harrington was aware of the hazard involved in his conduct. He was an expert in the use of firearms and knew full well that if the safety of the gun were not in place or did not function, he would be killed. Unless he had that risk in mind, there would be no purpose in doing what he did—no point in "proving" so dramatically that the safety would work. Equally convincing, and much more prudent, "proof" of the effectiveness of the safety device could have been demonstrated by pointing the gun at the floor or the ceiling and pulling the trigger. But the insured sought to dramatize the proof by voluntarily embracing the calculated danger of death. In pointing the gun at his head, he either intended to kill himself or was recklessly and needlessly demonstrating his willingness to accept a mortal risk.

As a matter of law, it makes little difference whether Arnold Harrington intended to kill himself or thought that the safety would protect him. In the one case his act was suicidal. In the other it was so inherently and obviously

dangerous as to involve a grave risk of mortal injury, which occurring, was not accidental. In either case, appellant is entitled to judgment.

CONCLUSION

For the foregoing reasons, the judgment should be reversed and the case remanded with directions that judgment be entered for appellant.

Dated: September 27, 1961.

Respectfully submitted,

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Attorneys for Appellant

(Appendix Follows)

Appendix

Pursuant to subdivision 2(f) of Rule 18 of the Rules of this Court the following reference is made to exhibits a part of this record:

Exhibits	Identified	Offered	Received
Plaintiff's Ex. 1, Mauser automatic pistol and holster	R. 78	R. 78	R. 78
Plaintiff's Ex. 2, Proofs of Death, Claimant's Statement	R. 122-23	R. 123	R. 124
Plaintiff's Ex. 3, policies of insurance	R. 125	R. 125	R. 125-26
Plaintiff's Ex. 4, statement of Arnold Harrington, Jr.	R. 161	R. 168-69	R. 168-69
Plaintiff's Ex. 5, statement of Joyce A. Harrington	R. 161		
Plaintiff's Ex. 6, Deposition of Arnold Harrington, Jr.	R. 169	R. 169	R. 169
Plaintiff's Ex. 7, May 3, 1960 letter from defendant to plaintiff	R. 255	R. 255	R. 255
Defendant's Ex. A1-4, police diagrams of living room	R. 140-41	R. 142	R. 142-43
Defendant's Ex. B1-5, police photographs of living room	R. 147	R. 147	R. 147
Defendant's Ex. B6, police enlargement of Ex. B1	R. 150	R. 150	R. 150
Defendant's Ex. C1-3, photographs of Ex. 1	R. 230	R. 230	R. 230